*The*

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IN THIS ISSUE

## DECLARATORY RELIEF IN CALIFORNIA

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## REPORT ON AMERICAN LAW INSTITUTE

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## Declaratory Relief in California


*By* W. TURNEY FOX
*Professor of Law, University of Southern California*


The term "declaratory relief" or "declaratory judgment" is a relatively new and somewhat unfamiliar name for a type of relief or judgment that the legal profession is familiar with, at least in some of its aspects. These terms are used to describe the relief which is granted in cases where the court, instead of awarding damages, or the possession of property, or an injunction or mandatory decree, merely determines and declares the rights of the parties to the action.

We have long been accustomed to make use of this type of relief in adjusting adverse claims to real property, commonly known as an action "to quiet title," under section 738 of the Code of Civil Procedure; and by the amendment of that section in 1921 the same relief was extended to suit involving rights to personal property. Proceedings under the McEerney Act, under the Torrens Act, and under the Code sections (749a-751 C C P) for quieting title against unknown claimants after twenty years' possession, are of the same general character. Likewise the same general principles underlie proceedings to establish the validity of bonds of reclamation districts under section 3480 of the Political Code.

Another phase of this form of relief involves the matter of *status* and is exemplified in such provisions as are found in sections 78 and 80 of the Civil Code providing for actions to establish the validity or invalidity of marriages. Illustrative of this principle is the famous case of Sharon v. Sharon (67 Cal. 185) decided in 1885. Also, section 231 of the Civil Code, added in 1921, which provides that any person may bring an action to have determined the existence or non-existence of the relation of parent and child, by birth or adoption, further illustrates this form of relief.

A third field in which the theory and the principles of declaratory relief have long been recognized and made use of in this state, is in the matter of the administration of estates and the distribution of property. The decree of distribution not only constitutes a muniment of title, but also declares all rights of the interested parties, whether arising under the will or the succession statutes. Luscomb v. Fintzelberg (162 Cal. 433) and cases there cited. Moreover, we have, under section 1664 of the Code of Civil Procedure, a scheme provided whereby any person may have his rights declared as heir or under a decedent's will. The decree rendered in this proceeding is entirely declaratory, both in form and effect, and constitutes an adjudication of rights in the decedent's estate. Estate of Horman (167 Cal. 473).

While the above-mentioned code sections

cover in a fairly comprehensive way the particular subjects to which they relate, there is still left a considerable field for the application and development of the principles of declaratory relief. The legislature sought to cover this field by the adoption in 1921 of sections 1060, 1061 and 1062, Code of Civil Procedure. Although the theory of declaratory relief originated in the Roman law and was later adopted and extensively used in many European countries and in Scotland for the last four centuries, our sections were in general modeled after the English system which was first adopted in that country in 1852 and subsequently expanded and supplemented in 1883 and 1893. Statutory provisions for declaratory relief, and of the same general character as those now in force in this state, have, within the last few years, been adopted in a number of our states, notably Kansas, New York, New Jersey, Rhode Island, Pennsylvania, Kentucky, Tennessee, Florida, Virginia, North Dakota, South Dakota, Utah, Wyoming and perhaps others.

However, the fact should not be overlooked that we, in California, have had provisions for declaratory relief, at least to a limited extent, practically from statehood. In the Practice Act of 1850 we had the provision now restated as section 1050, of the Code of Civil Procedure that, "an action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation." This section, however, does not provide for the declaration of a right of the plaintiff, but only for a declaration of the absence of liability to the defendant, yet as far as it goes, it is a distinct and valuable recognition of the desirability of the judgment declaring rights *in personam*. As a matter of fact, this statute covers the very situation to which the English rules were not held to apply until 1915, although our court had applied it as early as 1855 in the case of King v. Hall (5 Cal. 82). In that case the plaintiff prosecuted his action under this section of the Practice Act for a declaration that he was not indebted to the defendant upon a promissory note. Frequent application of the principles of this section have since been made. Among the more recent cases is that of Wenban Estate, Inc. v. Hewlett (193 Cal. 675), in which plaintiff sought, among other things, a declaration that it was not liable on certain bonds.

Reference, however, to section 1060, Code of Civil Procedure, shows that it goes far beyond the compass of section 1050, in that it provides "The declaration may be either affirmative or negative in form and effect."

The practical value of this section and its companion sections 1061 and 1062 depends in a large measure upon the interpretation of the phraseology "in cases of actual controversy." In attempting to solve the question, as to what is an actual controversy, we get no assistance from our state reports. Although these sections have been in our code for more than five years there has been only one case involving them appealed. That was the case of Blakeslee v. Wilson (190 Cal. 479), which merely held these sections constitutional without attempting to construe them. This being the situation, we are constrained to look to other jurisdictions for light on the question.

Under the English decisions it seems to be the rule that the mere existence of doubt as to the rights of the parties, a mere possibility of a dispute is not sufficient to secure a declaration of rights. This is typically illustrated by the case of In re Clay ([1919] 1 Ch. 66), where the plaintiff sought a declaration that the defendant had no claim against him under a bond. It appeared, however, that the defendant had never asserted any such claim except by reserving, in connection with the execution of another paper, whatever rights he might have under the bond. The court refused to grant any declaratory relief.

The tendency of American courts, it would seem, is to follow this English rule. This is indicated by the case of West v. City of Wichita (234 Pac. 978) decided by the Supreme Court of Kansas in 1925. The City of Wichita had passed a comprehensive zoning ordinance. Plaintiff was the owner of several

lots in different parts of the city. He brought an action under the declaratory judgment statute to test the validity of all the provisions of the ordinance. He had made no application for a building permit to erect any kind of a structure upon any of his lots. He claimed, however, that the provisions of the ordinance might interfere with uses which he might desire to make of his property, or prevent a sale of the property to some one who desired to make a specific use of it. The court held there was no actual controversy, "because there was no specific contemplated use the plaintiff then sought to make of his property." The court said: "The owner is not entitled to litigate under this statute questions which may never affect him to his disadvantage. To speculate upon possible uses that the owner or his vendee might desire to make of the property, and seek a judgment determining them, is simply to ask the opinion of the court with reference to a situation that may never arise."

In the case of Russian Com. & Ind. Bk. v. British Bk. ([90 L. J. K. B. N. S. 1089], [19 A. L. R. 1101]) decided by the House of Lords in 1921, it appeared that a loan had been made to an English bank by a Russian bank through its branch in London. This loan was secured by the deposit of certain bonds. In order to decide whether or not it wanted to redeem the security the English bank desired to know whether the loan was a sterling or ruble loan. In order to determine this question a declaratory action was brought. It was urged that this was not a proper case for a declaration. In passing on this question Lord Dunedin called attention to the fact that the action of declarator had existed in Scotland for hundreds of years and then said: "The rules which have been elucidated by a long course of decisions in the Scottish Courts may be summarized thus: The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor—that is to say—some one presently existing, who has a true interest to oppose the declaration sought." He then proceeded to adopt and apply this rule.

In Guaranty Trust Co. v. Hanway & Co. ([1915] 2 K. B. 536), Pickford L. J. said: "I think, therefore, that the effect of the rule is to give a general power to make a declaration, whether there be a cause or not, and at the instance of any party who is interested in the subject matter of the declaration. It does not extend to enable a stranger to the transaction to go and ask the court to express its opinion in order to help him in other transactions."

This same question was presented to the Supreme Court of Tennessee in 1924 in the case of Miller v. Miller (261 S. W. 965). After discussing, among others, the above English cases the court said: ". . . the only controversy necessary to invoke the action of the court and have it declare rights under our declaratory judgment statute is that the question must be real, not theoretical; the person raising it must have a real interest, and there must be some one having a real interest in the question who may oppose the declaration sought. It is not necessary that any breach should be first committed, any right invaded, or wrong done."

The Supreme Court of Virginia, in the case Patterson's Executors v. Patterson (131 S. E. 217), decided in 1926, after a review of many of the English and American authorities, approved and followed the principles announced in the foregoing cases.

In view of the fact that our code provisions already referred to fairly cover the situation with respect to disputed matters regarding property rights and status, it would seem that these new sections would likely be made use of most frequently in settling disputes arising in contracts. For it is in this field that declaratory relief should prove of the greatest value since under the conventional theories of the law every contracting party must await an actual breach of the contract before he can obtain any authoritative adjudication of

*(Continued on page 13)*

# Report Upon American Law Institute

*By* JOHN PERRY WOOD

On April 28 and 29 and May 1 of this year the American Law Institute held at Washington, D. C., its fourth annual meeting. With Judge Louis W. Myers, our greatly respected former Chief Justice, I had the privilege of attending the sessions. Judge Myers attended as a representative of our Supreme Court, I merely because I had the honor of an invitation. The meeting was so inspiring, its work so enormously promising that, since Judge Welch has been unable to take his place upon the program, I thought that I might with profit to the judges take a little of his allotted time to tell you something about the organization and work of the Institute. Unfortunately the profession as a whole even today has quite inadequate knowledge of this undertaking. All judges and all lawyers recognize the difficulty to resist the tendency, not unnatural in view of the complexity and uncertainty of our law, to hesitate before the spears of embattled counsel, awaiting the buckler of a pat case, rather than to settle the controversy and end the bickerings by the application of known principles. Nothing will be more helpful to those who desire to resist this tendency than to take advantage of the results of the work of the Institute.

On February 23, 1923, at a meeting of judges, lawyers and law teachers at Washington, D. C., the American Law Institute was organized. A group of over three hundred had met voluntarily at their own expense to consider the condition of the administration of justice in the United States. There were present representatives of most of the highest courts of the United States and of the several States. The Chief Justice of the United States was present, the President and Ex-Presidents of the American Bar Association, Presidents of many of the State Bar Associations, and principal members of the faculties of the leading law schools of the country. This group for nearly a year, by correspondence and by meetings, had been considering the causes of the existing unnecessary complexity and uncertainty of the law. It was decided that existing conditions in judicial administration could not be remedied until first this uncertainty and complexity could be reduced. Something must be done to relieve the judges and the profession of the intolerable burden of seeking law among the mass and maze of precedents, of not finding it, or mistaking it, or clogging the machinery of pustice in the effort to find what it is. The idea was conceived of making a Restatement of the law, not of the statutory law but of the common law as applied in the United States, in concise form, accurately stating the law as shown by the better reasoned authorities, but noting the exceptions and departures.

This obviously was a stupendous undertaking. The work of Trebonian and his colleagues in the days of Justinian was trifling in comparison. How could it be done? Clearly only the most learned and expert men of the land could accomplish it. For this both money and devotion to the high ideals of our profession would be required. In the group assembled were men who could be depended upon for thoughtful action, such men as Taft, Root, Wickersham, Cordoza, Hughes, Draper. It was thought that since some of the philanthropic trusts had done so much to advance the science of medicine, one of them might be persuaded to supply the funds for scientific research in the law. The Carnegie corporation was consulted. To its directors was made clear the facts that little has been done in any organized way for the advancement of legal research, that such research has been in the main individualistic or for the publication of digests and texts to be sold to the profession, and therefore inadequate, that in no branch of science, if the law may still be regarded as a science, has so little really scientific work been done as in the law, yet

nowhere is there greater need of it. The Carnegie corporation responded with a gift of $1,075,000, payable over a period of ten years, thus giving the Institute from that source alone an income in excess of $100,000 a year. Since then other gifts have been made. With these funds a working organization was possible. It was decided to undertake first the subjects of Conflict of Laws, Agency, Contracts and Torts. For each of these a reporter was appointed. Upon Conflict of Laws Mr. Joseph H. Beale of the Harvard Law School, who has devoted nearly thirty years of his life to the subject, and who is the recognized authority upon it in the United States; upon Agency Mr. Floyd Meecham, so well know to all, of the University of Chicago; upon Contracts Mr. Samuel Williston of Harvard, author of the monumental work upon the subject. Each reporter was provided with paid assistants who work under his immediate supervision and with a group of advisors selected from among other lawyers and law teachers, authorities upon the subject. The plan was that the reporter and his assistants should prepare tentative drafts of the Restatement for submission to his advisors. These advisors are men recognized as peculiarly capable to deal with the particular subject. After individual study by the advisors conferences are held, redrafts are made, other individual studies made and other conferences had. Finally when the reporter and his advisors are satisfied with the Restatement, it is submitted to the Council, which is the executive body of the Institute, composed of thirty-three members selected from among the lawyers and law teachers of the country who are both able and disposed to give serious effort to the work of the Institute. Again suggestions and corrections are made and the draft re-referred to the reporter. Finally when the reporter and his advisors and the Council are all satisfied with the Restatement it is sent in printed form to each member of the Institute in ample time for examination prior to the annual meeting. There other

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## Report Upon American Law Institute

*(Continued from page 7)*

citicism and suggestions are made and the tentative statement re-referred to the reporter and his Council. Written criticisms and suggestions are made by members both before and after the meeting of the Institute.

The operation of this plan has been tremendously interesting and productive of a result little short of marvelous. The Restatements are made so far as possible in terms of the "lowest common denominators," reduced to the simplest possible form, expressing so far as is humanly possible exact fundamental legal concepts. Judging from the tentative drafts I have seen I venture the assertion that a judge or a lawyer confronted with a difficult legal problem which seems perhaps hopelessly involved in a maze of decisions will find his doubts and difficulties cleared away and be able to steer a straight course if he can have before him the comprehensive but simple and clarifying Restatement upon the subject of the American Law Institute. The work has not been finished even upon the first subject, although its first draft was presented by the reporter to his advisors in June, 1923. Conference after conference has been held, reference and re-reference by the reporter to his advisors and vice versa and by the reporter and his advisors to the Institute. That subject will, however, soon be out and he who has a difficult problem upon Conflict of Laws will, I believe, find infinite comfort in it. Certainly the Bench will find the Restatements, even the present tentative ones, of incalculable benefit in clearing away difficulties and saving time. Copies of the tentative Restatements may be had at trifling cost, that of their production, by writing to the office of the Institute at 3400 Chestnut Street, Philadelphia.

I wish it were possible for me to adequately paint a picture of the last meeting of the Institute at Washington. Nothing could better convince you of the greatness and the value of this work that is being done. There were judges, law teachers, lawyers, carefully selected from among those both capable of doing a high order of work and ready in the public behalf to do it. Never have I seen together a group of lawyers or of any class of men who so impressed me by their faces, their bearing, their conduct in the discussions, the sincerity and intellectual honesty of their questions and answers. It would have been an inspiration to each of you, as it was to Judge Myers and to me.

Picture Meecham, the reporter on Agency, all day on the rostrum, a teacher of forty years, himself under quiz—an old man, gray and spare, but keen and whimsical, putting to rout most of the critics but admitting the force of many a suggestion and noting it for consideration upon a redraft. There was Beale of Harvard, stocky and bald, but quick, ready as an English sparrow, answering questions and standing up for his Restatement, but once in a while taking water, over the use perhaps of some one word.

The lawyers of the country were quizzing the seers of the profession to ascertain the law as it truly is for the weal of all of us, by grace of an unselfish devotion to the service of the law.

The greatness of the work that is being done consists of the fact that it is comprehensive yet simple. The hope of the Institute is, as stated by its director:

> "That when the work is done, the excellence of the work itself and of the personnel of the Institute will enable the Restatement to command the respect and attention of the courts. It is realized that the multiplication of jurisdictions, courts and decisions makes it necessary that the tendency toward uncertainty and unnecessary complexity be checked by the creation of *an agency whose statement regarding the principles of law*, by commanding the respect of the courts, will tend toward uniformity and certainty."

While it will be a long time before the Restatements upon all subjects are completed, they will not, like digests, be shortly obsolete. Indeed, *because* they will deal *with* fundamentals, they never will be obsolete, and because the *basic principles* of law are immutable, the Restatements of the American Law Institute will long make straight the way of the weary book-bound follower of the law. May I make bold to commend them to the use of the judges? They will be found to be of inestimable value for the ready and certain solution of legal problems.

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## Declaratory Relief in California

*(Continued from page 5)*

his rights. He may be in doubt about the validity of the contract, the meaning of its terms, the effect of a statute upon the contractual obligation, the obligation to continue performance after some act done by the other party, but whatever his doubt may be, he can obtain nothing better than the opinion of counsel which may or may not agree with the later decision of the court. The decision itself he cannot secure until he or the other contracting party has committed some act which can be relied on as a breach of contract and subjected himself to a possible liability for damages. No matter what his good faith, or desire to perform his obligation, the law casts upon him the duty of resolving all doubts against himself under penalty of a recovery of damages if his judgment and that of his counsel should disagree with that of the court. The English courts have solved this difficulty by allowing a declaratory action to be brought at any time by either party to the contract for the purpose of obtaining a definition of rights under the contract. We may reasonably expect to accomplish the same desirable results under our code provisions. In order to appreciate the measure of success the English courts have met with in solving this problem, it may be well to instance a few cases in which this relief was granted.

In the case of Lovesy v. Palmer ([1916] 2 Ch. 233), the parties had had some correspondence and the plaintiff claimed that it amounted to a contract to make a lease. Under our former practice this question could not have been determined until there had been a refusal to perform, but the English court in this instance allowed plaintiff to maintain an action to have it declared whether or not the letters constituted a contract.

Under our declaratory relief sections, it would seem, our court might also decide by declaration whether one party has defaulted in performance to such an extent as to release the other party from further performance upon his part. In the case of In re Soden & Alexander's Contract ([1918] 2 Ch. 258), the vendor of real estate claimed that he had a good marketable title. The vendee claimed that the title was defective and made certain objections. The court made a declaration that the objections were good and the title defective.

Another English case of interest in this connection is that of In re Dott's Lease ([1920] 1 Ch. 281). This case involved the interpretation of certain terms in a lease of a theater. The lessee covenanted that he would "maintain the prices of admission as now charged" and would not "reduce the same without the consent of the lessor." The lessee decided that he wanted to raise the admission charges. The lessor contended that to do so would be a breach of the covenant to "maintain" them. The court upon application of the lessee granted a declaration that he could raise the admission charges.

The case of In re Meyrick's Settlement ([1921] 1 Ch. 311), was a case in which a husband and wife had made a separation agreement. The husband contended it was void as against public policy. The court granted a declaration that the agreement was valid and binding.

Attention should here be directed to the fact that a party may ask for a declaration, either alone or with other relief. Section 1060 provides that one "may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights and duties, whether or not further relief is or could be claimed at the time." This provision follows the English practice. A plaintiff might ask an injunction and a declaration and the court might refuse the injunction but grant the declaration. On the other hand, the plaintiff might obtain both damages and a declaration. This was done in the English case of Elliott Steam Tug Co. Ltd. v. John Payne & Co. ([1920] 25 Com. Cas. 208), where the court made a declaration that a charter party remained in force and awarded the plaintiff damages for past breaches.

It should also be noted in this connection that section 1962 provides that "the remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts." This section was, no doubt, inserted to obviate the situation that exists under our system of code pleading under which forms of action are abolished and the plaintiff required to obtain

in one action all relief, whether legal or equitable, to which he is entitled under the facts. Although the "declaration shall have the force of a final judgment," the plaintiff would not be precluded from later seeking other relief based upon the same facts.

Probably upon the ground of public policy no provision has been made for relief against the state. It has been urged by some that the citizen should be allowed to bring an action against the state or its officials to determine the scope of duties imposed by a statute or to determine the constitutionality of legislation generally. But as the sections now stand such relief is impossible.

Although a wide jurisdiction is conferred by the sections, the court is not bound to make a declaration of rights whenever a request for one is made; for section 1061 provides that "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." This enables the courts to prevent abuse of the declaratory action. The English courts, while they have not professed to be governed by definite and well-settled rules in the exercise of this discretion, have not hesitated to withhold declaratory relief whenever they have felt satisfied that no useful purpose would be accomplished.

It is suggested that in order to get the greatest practical value from our sections on declaratory relief, provision should be made, as is made in most other jurisdictions having similar statutes, giving to such causes a preferential place on the trial calendar analogous to injunction proceedings and other preferred causes. In fact such a bill was introduced in the last legislature and passed by both houses but vetoed by the Governor.

The writer fully appreciates that declaratory relief is not a panacea for all the ills of litigants, but believes that if made proper use of it will most assuredly tend to eliminate much of the destructive part of litigation, and as has been said in what may perhaps be termed a trite and homely simile our courts "will no longer be used as repair shops but as service stations." But, in any event, the most pessimistic practitioner must admit that declaratory relief provides a means whereby much of the bitterness of litigation may be obviated, and the confidence and respect of the layman for our legal system greatly increased.


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